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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. LUIS ALFREDO LOPEZ, Defendant and Appellant.	B295734 (Los Angeles County Super. Ct. No. VA148599)

APPEAL from a judgment of the Superior Court of Los Angeles County, John A. Torribio, Judge. Affirmed.

R.E. Scott & Associates and R.E. Scott, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Chief Assistant Attorney General, Susan Sullivan Pithey, Assistant Attorney General, David E. Madeo and Kathy S. Pomerantz, Deputy Attorneys General, for Plaintiff and Respondent.

SUMMARY

Defendant Luis Lopez appeals from the judgment entered following his conviction for felony vandalism, criminal threats, and possession and use of a deadly weapon (to wit, a screwdriver) arising out of two incidents in 2018. On appeal, defendant contends: (1) the trial court prejudicially erred in allowing the prosecution to elicit evidence from a witness that defendant was a gang member; (2) the court prejudicially erred when it denied his request to reopen his case to allow him to testify after he had explicitly waived his right to testify and the jury had already been instructed; and (3) the matter should be remanded for the trial court to conduct an ability to pay hearing on the assessments and fines imposed against him. Finding no error, we affirm.

PROCEDURAL BACKGROUND

On November 30, 2018, an amended information was filed, consolidating two cases against defendant. As relevant here, the information alleged: felony vandalism (Pen. Code, § 594, subd. (a);[1] count 1); possession of a dirk or dagger (§ 21310; counts 3 and 5); and criminal threats (§ 422, subd.(a); count 4). The information also alleged as to each count that defendant suffered a prior "strike" conviction (§§ 667, subd. (d), 1170.12, subd. (b)), and a prior serious felony conviction (§ 667, subd. (a)(1).) As to count 4, it was alleged defendant personally used a deadly and dangerous weapon (a screwdriver).

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[1] Unless otherwise stated, statutory references are to the Penal Code.

(§ 12022, subd. (b)(1).) The counts against appellant arose from separate incidents in Downey against different victims. Counts 1 and 3 arose from an incident in May 2018, against Theodoros Gavriiloglou, and counts 4 and 5 arose from a September 2018 incident against Fernando Suranjith. The information also alleged two prior prison terms for robbery, which were bifurcated for trial (§ 211).

In December 2018, a jury found defendant guilty on counts 1, 3, 4 and 5. Defendant admitted the two priors. In February 2019, defendant was sentenced to a prison term of 12 years, four months. The court also ordered defendant to pay a restitution fine of $300 (§ 1202.4, subd. (b)(1)), and a parole/post-release community supervision fine of $300 (stayed unless parole or community release is revoked (§ 1202.45)). As to each count, the court further imposed assessments of $40 court for operations (§ 1465.8, subd. (a)(1)), and $30 for criminal convictions. (Gov. Code, § 70373). This timely appeal ensued.

FACTUAL BACKGROUND

Gavriiloglou Incident (*Counts 1 & 3*)

Just before midnight on May 14, 2018, Gavriiloglou pulled into a gas station in Downey to put fuel into his car. As he pumped gas, Gavriiloglou watched defendant approach him from across the lot, holding something in his hand. When defendant reached the car, he set down the object in his hand and told Gavriiloglou that this was his "hood" and that defendant was "Dog Patch," which Gavriiloglou knew was a local gang. Defendant reached into his pocket and walked toward Gavriiloglou, who threatened to spray him with gas. Gavriiloglou was

afraid defendant had a gun in his pocket. Defendant walked to the other side of the car, drew out a "shiny" object that Gavriiloglou thought was a knife (but was a screwdriver) and threatened to stab Gavriiloglou. Defendant scratched and dented the passenger side of the car with the screwdriver, causing up to $1,800 in damage.[2]

Downey Police Department (DPD) Officer David Mejia responded to a call regarding the incident at the gas station. Officer Mejia spoke to defendant, who said that he was at the station to pump gas, that he had exchanged words with Gavriiloglou, and that Gavriiloglou had threatened to spray him with gas. Defendant denied pulling out a screwdriver or scratching Gavriiloglou's car. Defendant was searched, and a screwdriver was found in his pocket.

Suranjith Incident (*Counts 4 & 5*)

Suranjith worked at a liquor store in Downey which defendant frequented about once a week to buy soda and other things. Defendant had loitered in the store and "made trouble" for Suranjith in the past. Suranjith sometimes gave things to defendant to get him out of the store.

On the evening of September 2, 2018, defendant came into the store, and told Suranjith, "Today I kill you."[3] Defendant carried a screwdriver and at least five times threatened to kill Suranjith. At one

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[2] This incident was captured on surveillance video and shown to the jury.

[3] This incident was captured on surveillance video shown to the jury.

point, he leaned over the counter and made a stabbing motion at Suranjith with the screwdriver. Suranjith called the police after defendant bit a display board and threw trays of gum on the floor. Defendant left before the DPD arrived.

DPD Officer Erik Hempe responded to the scene and saw defendant standing on the street corner, holding a bicycle and a bag. When the officer told defendant to put them down, defendant told him to "fuck off" and asked the officer repeatedly to shoot him. After Officer Hempe drew his gun, defendant complied with his orders. A search revealed a small screwdriver concealed in defendant's pocket.

DISCUSSION

I. *Gang Evidence*

Defendant argues he suffered prejudicial error, and that it was a violation of his rights to due process and a fair trial, when the trial court permitted the prosecutor to elicit evidence that defendant was a member of the Dog Patch gang. We conclude otherwise.

Relevant Proceedings

During the prosecution's case-in-chief, Gavriiloglou testified that, when defendant approached him, he said it was his "hood" and he was "Dog Patch." The trial court overruled defendant's relevance objection, and Gavriiloglou testified he lived in the Downey area and knew that Dog Patch was a gang. The prosecutor asked Gavriiloglou how he felt when defendant said he was a member of Dog Patch. The trial court

overruled defendant's relevance objection and denied defense counsel's request for a side bar.

Later, outside the jury's presence, the trial court noted that defense counsel wanted to "amplify the record regarding some objections that were made, and . . . an officer's [earlier] testimony." Defendant's counsel argued that the gang-related evidence lacked relevance to the vandalism charge and was highly prejudicial under Evidence Code section 352 (section 352). At the time, the court was unsure whether defendant was charged with having made a criminal threat as to Gavriiloglou. The prosecutor explained defendant was initially charged with two counts of making criminal threats, but that one count (count 2, based on what occurred at the gas station) had been dismissed. The court found the prosecutor was judicially estopped from proceeding on count 2, and dismissed it. Nevertheless, with respect to defendant's objection, the trial judge said his "ruling [as to the gang-related evidence would] stay the same as [he thought] the defendant's statements [went] to his state of mind, the fact that he was angry, and, therefore, would tend to corroborate that he might have done some foolish act out there when he was in this confrontation with [Gavriiloglou]."

Defendant contends that the court was operating under the misapprehension that the issue of criminal threats was relevant to the gas station incident when it refused to let him state a relevance objection on the record when the prosecutor elicited gang-related evidence from Gavriiloglou. However, once it learned it had

misunderstood the circumstances, the court simply deemed the evidence relevant without conducting the requisite section 352 analysis.

The Court Did Not Err

A trial court may exclude evidence if its probative value is substantially outweighed by the probability that its admission will create a substantial danger of undue prejudice. (§ 352.) A trial court has broad discretion to assess whether the probative value of gang-related evidence is outweighed by concerns of undue prejudice, and an appellate court will not interfere with its ruling absent a showing that the trial court exercised its discretion in an arbitrary or capricious manner that resulted in a manifest miscarriage of justice. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124; *People v. Valdez* (1997) 58 Cal.App.4th 494, 511.) Typically, where, as here, there is no gang enhancement at issue, evidence of gang membership is properly excluded if its probative value is minimal given the potential prejudice to the defendant. (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1049.) Even so, gang evidence is often relevant and admissible as to issues of "motive, . . . means of applying force or fear, or other issues pertinent to guilt of the charged crime." (*Ibid.*; see also *People v. Frausto* (1982) 135 Cal.App.3d 129, 140 [evidence of membership in a gang is properly introduced if it is "relevant on the issue of motive"]; *People v. Avitia* (2005) 127 Cal.App.4th 185, 192 ["Gang evidence is admissible if it is logically relevant to some material issue in the case other than character evidence, is not more prejudicial than probative, and is not cumulative"].)

Here, the trial court concluded that evidence of defendant's gang membership was relevant to prove that he committed the crime of vandalism as described by Gavriiloglou. Indeed, defendant's gang membership and gang-related motive constituted compelling evidence that defendant did exactly what Gavriiloglou testified he did. According to Gavriiloglou, at the gas station, defendant told him that the station was in his "hood," and that he was a member of the Dog Patch gang, which Gavriiloglou knew to be a local gang. After Gavriiloglou threatened to spray him with gas, defendant scratched and dented the passenger side of Gavriiloglou's car with a screwdriver. Obviously, this evidence created a strong inference that defendant vandalized the car because Gavriiloglou was in Dog Patch territory, where he did not belong, and that he had shown disrespect to defendant by threatening to spray him. As the prosecutor observed in closing, the gang evidence, although tangential to the elements of the specific crime, gave the jury context to understand defendant's motive for vandalizing an interloper's car.

Nor was introduction of the gang evidence unduly prejudicial. The term "prejudicial" is not synonymous with "damaging" under section 352, but merely refers to an unfair or inflammatory impact. (See *People v. Branch* (2001) 91 Cal.App.4th 274, 286.) In this case, the evidence of defendant's gang membership was not excessive in scope or quantity. It was brief, and closely tethered to Gavriiloglou's description of the incident. Further, it was not likely to be unduly inflammatory, given

the surveillance video evidence, which established that defendant vandalized Gavriiloglou's car.[4]

We disagree with defendant that the record is "totally deficient" of evidence that the trial court was aware of its obligation to conduct a section 352 analysis with regard to the gang evidence. Defense counsel specifically argued that the gang evidence was not relevant to the charge for vandalism and "highly prejudicial" under section 352. Thus, the court clearly was aware of the basis for the objection. The trial court is not required expressly to weigh prejudice against probative value, nor even to state it has done so if the record shows it was aware of and performed its balancing functions under section 352. (*People v. Hinton* (2006) 37 Cal.4th 839, 892.) In this case, the trial court heard argument from both sides and overruled defendant's objection because the gang evidence was probative of defendant's state of mind, i.e. "the fact that he was angry, and, therefore, would tend to corroborate that he might have done some foolish act out there when he was in this confrontation." We presume the court understood that section 352 requires the admission of relevant evidence unless its probative value is substantially outweighed by its prejudicial effect. (See *People v. Prince* (2007) 40 Cal.4th 1179, 1237 [based on court's reference to probative value of the evidence, it was proper to infer the trial court concluded the

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[4] We reject defendant's contention that the gang evidence was irrelevant to his mental state because vandalism is not a specific intent crime. Where, as here a defendant pleads not guilty, he places all issues in dispute and, among other things, evidence of the perpetrator's intent and motive are material. (*People v. Walker* (2006) 139 Cal.App.4th 782, 796; see *People v. Perez* (1974) 42 Cal.App.3d 760, 767 ["Motive is always relevant in a criminal prosecution"].)

probative value outweighed any undue prejudice].) Here, the record as a whole reflects that the trial court performed the requisite section 352 analysis.

In any event, even if we assume the trial court erred, we would find the error harmless whether considered under the standard of *People v. Watson* (1956) 46 Cal.2d 818, 836, or *Chapman v. California* (1967) 386 U.S. 18. Based on video surveillance evidence, there was no question defendant used a screwdriver to scratch Gavriiloglou's car, committing vandalism. Indeed, defendant's counsel conceded his client committed the crime at the gas station. Hence, beyond any possible doubt, the introduction of the gang evidence did not affect the verdict.

II. *Request to Re-Open Defense Case*

Defendant expressly waived his right to testify after the prosecution completed its case-in-chief. But after the court instructed the jury on the relevant law (save the concluding instructions regarding deliberations), and just as the prosecutor began his closing argument, defendant requested that the evidence be re-opened so he could testify on his own behalf. The trial court denied the request. Defendant contends that the trial court erred. He is mistaken.

Relevant Proceedings

On Friday afternoon, November 30, 2018, after completing its case-in-chief, the prosecution requested permission briefly to reopen and question the DPD officer as to where he found the screwdriver on defendant's person in the Suranjith incident (Counts 4 & 5). The court

permitted the prosecution to reopen its case for this limited purpose over defendant's objection. The court also inquired whether defendant planned to testify, and his counsel requested an opportunity to discuss the question with his client.

Thereafter, outside the jury's presence, defendant's attorney informed the court he had advised defendant "pretty thoroughly" about whether to testify and requested that the court take defendant's waiver. The following exchange occurred:

> "THE COURT: Mr. Lopez, you have the right to testify. No one can stop you from testifying. Even if [defense counsel] said, 'Do not testify. It's not in your best interests,' you have the right to say, 'No, I want to testify.' [¶] Also, even if [defense counsel] told you you must testify, if you say you don't want to testify, no one can make you testify. [¶] Do you understand that?
>
> "[DEFENDANT]: Yes.
>
> "THE COURT: Understanding that, do you want to testify?
>
> "[DEFENDANT]: No."

Evidence was reopened to permit the DPD officer to testify he had found a screwdriver concealed in defendant's pocket, and the prosecution rested.

Proceedings resumed the following Monday, December 3, 2018. Outside the jury's presence and before instructing the jury, the court noted that defendant was not present in court and explained he had an outburst: "[Defendant] exploded. It's the only way to describe it. Vilified [defense counsel]. [The bailiff] saw fit to remove him from the courtroom . . . and I heard him going down the hall screaming and

yelling expletives and insulting [defense counsel] and otherwise denigrating him. [¶] And I also think I heard—I maybe misspoken—misheard I mean—that he said he didn't want to be here."

The bailiff also said he heard defendant say he did not want to be in the courtroom. The court granted defense counsel's request to speak with his client, but explained that defendant needed to be "admonished that he has to behave, and if he doesn't, he'll be removed from the courtroom." The court and counsel then proceeded to discuss jury instructions. The court, all counsel and the reporter then proceeded to the lockup area to enable the court to "inquire about [defendant's] attitude towards coming to court and [whether he] will . . . behave, and admonish him if he acts up, he will be removed from the courtroom." The supervising deputy informed the court that several deputies had talked to defendant, who was "completely refusing to exit the cell[,]" and had removed his civilian clothes and put on his jail jumpsuit. The judge asked defendant directly if he intended to come out, to which defendant responded, "[W]hen I get a defense" and "Sir, if I get a defense, I go out there, but I have no defense attorney." Defendant then walked away from the trial judge who informed him the trial would continue, to which defendant responded, "Okay."

When proceedings continued in the courtroom in the presence of the jurors, the court informed them defendant would be absent the remainder of trial, which was his prerogative, and that they could not use his absence from the courtroom against him. The court then instructed the jury. Just as the prosecutor was about to begin his

closing argument, the court was informed that defendant wanted to return, and ordered the jurors out of the courtroom.

Outside the juror's presence, defendant returned to the courtroom, and the court admonished him that "if [he] misbehave[d] in any way, [he'd] be removed." Defendant acknowledged that he understood. The court informed defendant he had only missed jury instructions. Defendant's counsel then informed the court that defendant wanted to testify, but counsel had informed him it would not be appropriate at this point. "We will make a record then."

Before making a record, the court had the jury return, and the prosecution's argument was completed. At the lunch adjournment, after the jury left the courtroom, the court addressed defendant's belated request to testify, observing: "The court has . . . completed everything [and] read all of the instructions to the jury. [Defendant] had voluntarily absented himself from the courtroom, then asked to come back. We brought him back. It's the court's position that [defendant is] game playing, he's trying to create error; that the court took direct waivers, advised [defendant] that he had the right to testify, [and] the right not to testify; that only he could make that decision. He directly stated he did not want to testify. Based on his outbursts and conduct throughout this entire trial, including the pretrial proceedings when the court talked to him, [the] court believes this is nothing but game playing, and . . . will not reopen the trial to take testimony."

Controlling Law and the Standard of Review

A criminal defendant has a fundamental constitutional right to testify (or to refuse to testify) during the evidentiary phase of trial in his own defense. (*Harris v. New York* (1971) 401 U.S. 222, 230; *People v. Robles* (1970) 2 Cal.3d 205, 215; *People v. Gadson* (1993) 19 Cal.App.4th 1700, 1710.) However, as defendant acknowledges, to exercise that right, he must make "a timely and adequate demand to testify." (*People v. Alcala* (1992) 4 Cal.4th 742, 805.) Defendant also concedes that, in the absence of a record reflecting that he made a timely, adequate demand to testify, he ""may not await the outcome of the trial and then seek reversal based on his claim that . . . he was deprived of that opportunity."" (*People v. Enraca* (2012) 53 Cal.4th 735, 762–763.) The question whether defendant timely and adequately asserted his right to testify is committed to the trial court's sound discretion. (*People v. Earley* (2004) 122 Cal.App.4th 542, 546–547 (*Earley*).)

A request to testify following the close of evidence, such as was made here, is deemed a motion or request to reopen the defense case, and may be granted upon a defendant's showing of "good cause." (See §§ 1093, 1094; *People v. Riley* (2010) 185 Cal.App.4th 754, 766.) Whether to grant the motion is a decision within the trial court's discretion. (*People v. Masters* (2016) 62 Cal.4th 1019, 1069 (*Masters*).) Under *Masters*, courts consider several factors in determining whether a trial court abused its discretion in refusing a request to reopen. They are: (1) the stage of the proceeding at which the request to reopen was

made; (2) defendant's diligence (or lack thereof) in presenting the new evidence; (3) the prospect that jurors might afford the new evidence undue emphasis; and (4) the significance of that evidence. (*Ibid*.)

Application

Here, there can be no real question that the *Masters* factors weigh in favor of the trial court's ruling. First, having explicitly waived his right to testify, defendant waited to request to testify until the evidentiary portion of the trial had concluded, the court had instructed on the relevant law, and closing arguments were just about to begin. (Cf., *People v. Marshall* (1996) 13 Cal.4th 799, 836 [finding "no constitutional error or abuse of discretion in the trial court's refusal to permit defendant" to present additional testimony after evidence was concluded and argument had begun].) Had defendant been permitted to reopen at this late stage of the proceeding, the court and counsel would have needed to reassess the instructions previously given, and possibly decide upon additional instructions regarding issues raised by defendant's testimony. Obviously, the orderly proceeding of the trial would have been disrupted. Courts have properly exercised their discretion to deny a defendant's request to reopen the evidence and testify even when such requests are made at an *earlier stage* in the proceeding than occurred here, i.e., *before* the jury was instructed. (See e.g., *Earley, supra,* 122 Cal.App.4th at p. 546; see also *United States v. Orozco* (9th Cir. 2014) 764 F.3d 997, 1002 [request to reopen before jury was instructed was "clearly untimely" and likely would have caused "at

least some disruption" to the proceeding]; *United States v. Medina* (7th Cir. 2005) 430 F.3d 869, 880 [trial court did not err in denying defendant's motion to reopen and testify after he waived the right to testify and the evidentiary portion of trial had closed, even though jury was not yet instructed and closing arguments had not begun]; *United States v. Peterson* (1st Cir. 2000) 233 F.3d 101, 106–107 (*Peterson*) [finding the trial court properly denied defendant's motion to reopen even though granting the request would cause merely a "small delay," because a "potential for disruption" existed in light of the fact that the jury expected to hear closing arguments and would be confused by the belated timing of defendant's testimony].)

The second *Masters* factor also weighs heavily against defendant. Defendant demonstrated no diligence in requesting to testify, and offered no reasonable (or any) explanation for his delay.[5] The record does not indicate that any unexpected evidence was revealed in the prosecution's case that needed to be addressed by defendant's testimony. Whatever evidence defendant belatedly wished to offer through his testimony was obviously available to him when he waived his right to testify. (See *People v. Monterroso* (2004) 34 Cal.4th 743, 779 [upholding denial of request to reopen where any "evidence [defendant] sought to offer at reopening was indisputably available *during* the trial"]; *Peterson, supra*, 233 F.3d at p. 107 [weighing strongly against

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[5] To the extent defendant remained displeased with the defense his counsel provided, that issue had been raised—and rejected—early on and a hearing conducted pursuant to *People v. Marsden* (1970) 2 Cal.3d 118.

defendant the absence of an excuse to reopen the case—"let alone a reasonable one"].) As the trial court concluded, defendant had been obstreperous throughout the trial, and his belated request to reopen did not reflect a true desire to testify, but was merely "game playing" in an attempt to create delay and the potential for reversal. In sum, defendant failed diligently to assert his desire to testify, and provided no cognizable excuse to justify the untimely request.

The third *Masters* factor requires the court to consider whether the jury would accord undue emphasis to new evidence defendant would offer upon reopening. (*Masters, supra*, 62 Cal.4th at p. 1069.) Here, the trial court could reasonably conclude that the jurors would accord defendant's testimony undue emphasis in light of the unusual circumstance of him testifying after they had been instructed and were expecting closing arguments.

The fourth and final *Masters* factor requires the court to examine the significance of new evidence defendant would present. It is not possible to conduct such an examination here, because neither defendant or his counsel identified the substance of defendant's testimony. Presumably, defendant would have denied the allegations against him. However, given the overwhelming and compelling evidence against him (surveillance footage of both incidents, and both victims' testimony), defendant's denial of the charges against him at this late stage of the proceeding was "far from critical." (*People v. Funes* (1994) 23 Cal.App.4th 1506, 1521.)

In sum, the *Masters* factors weigh in favor of upholding the trial court's refusal to reopen the evidentiary portion of the trial so defendant

could testify. We therefore conclude that the trial court did not abuse its discretion.

III. *Defendant Forfeited His Challenge to the Fines and Assessments*

As to each count, the trial court imposed a $40 court operational assessment (§ 1465.8, subd. (a)(1)), and a $30 criminal conviction assessment (Gov. Code, § 70373). The court also imposed the minimum $300 restitution fine. (§ 1202.4, subd. (b)(1).) Two operational and criminal conviction assessments were stayed, as were probation revocation and community supervision fines.

Relying on decisions of our colleagues in Division Seven, *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*) and *People v. Castellano* (2019) 33 Cal.App.5th 485 (*Castellano*), defendant contends we should remand the matter for the trial court to conduct an ability to pay hearing. In *Dueñas, supra*, 30 Cal.App.5th 1157, the court held that "due process of law requires the trial court to conduct an ability to pay hearing and ascertain a defendant's present ability to pay" before it imposes any fines or fees (*id.* at p. 1164; see also *Castellano, supra*, 33 Cal.App.5th at p. 490).

Defendant did not object in the trial court to the fines or fees based on his inability to pay. He argues the issue is not forfeited on appeal because, although *Dueñas* was decided shortly before he was sentenced, the decision had not yet been issued at the time of his conviction and any objection in the trial court would have been futile. Our colleagues in Division Eight addressed virtually the same

argument raised here and found that failure to object in the trial court resulted in forfeiture of this issue.[6] (*People v. Frandsen* (2019) 33 Cal.App.5th 1126, 1153–1155 (*Frandsen*).) We agree with *Frandsen's* reasoning that a failure to object in the trial court forfeits this issue on appeal, notwithstanding the decision in *Dueñas*. (*Frandsen*, at pp. 1153–1155; accord, *People v. Keene* (2019) 43 Cal.App.5th 861, 864.) Nothing in the record reflects that defendant was foreclosed from making the same request for an ability to pay hearing in the trial court as was made by the defendant in *Dueñas*. (*Dueñas, supra*, 30 Cal.App.5th at p. 1162.) Furthermore, not only had *Dueñas* issued before defendant's sentencing hearing but, as *Frandsen* explained, "*Dueñas* was foreseeable. Dueñas herself foresaw it." (*Frandsen, supra*, 33 Cal.App.5th at p. 1154.)

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[6] Frandsen, convicted of two felonies and sentenced to prison for 19 years to life, was ordered to pay court security and court operations assessments and a maximum restitution fine. (*Frandsen, supra*, 33 Cal.App.5th at pp. 1154–1155.) Like the defendant here, Frandsen did not object in the trial court that he was unable to pay assessments or the restitution fine. He too asserted the issue could be raised for the first time on appeal because the issue was a legal one and *Dueñas* announced "'a dramatic and unforeseen change in the law,'" which would have rendered an objection futile. (*Id*. at p. 1154.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

WILLHITE, J.

We concur:

MANELLA, P. J.

CURREY, J.